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No. 01-1867

IN THE
SUPREME COURT OF THE UNITED STATES

PHILLIP MULDER, LEON GIBBONS, CHARLES BUCK, GLENN HILTON, REBECCA MCREYNOLDS AND BARBARA KIPP,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Petition For Writ of Certiorari To The
United States Court of Appeals
For The Ninth Circuit

BRIEF OF AMICI CURIAE NATIONAL ASSOCIATION OF MANUFACTURERS AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. IN SUPPORT OF PETITIONER

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national trade associations of businesses. They are filing this amicus brief because of their mutual concern that the decision of the Ninth Circuit conflicts with holdings of this Court and with other circuits on an issue of great public importance: whether a labor union may require objecting nonmembers as a condition of employment to pay compulsory dues for the purpose of financially supporting union organizing campaigns.

The National Association of Manufacturers – 18 million people who make things in America – is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and all 50 states.

ABC is an association of more than 23,000 construction contractors and related firms. ABC's members share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC members include both non-union and unionized firms.

Many members of the Amici who are not presently unionized are targets of union organizing campaigns that are now being funded, in contravention of this Court's decisions in *Beck* and *Ellis*, by unlawfully compelled dues from objecting nonmembers of unions. At the same time, many members of the Amici who are already unionized now employ objecting nonmembers of labor unions, whose dues are being unlawfully compelled in support of union organizing, pursuant to the current policies of the National Labor Relations Board.

The Amici jointly believe that the legal issues under review are extremely important to employers and their employees throughout the nation. The decision of the Ninth

Circuit upholding the NLRB's ruling in this case ignores this Court's clear holdings and emasculates employee rights preserved under the National Labor Relations Act and the First Amendment.

ISSUES

The Amici hereby adopt and incorporate by reference the Petitioners' Questions Presented.

STATEMENT OF THE CASE

The Amici hereby adopt and incorporate by reference the Petitioners' Statement of the Case.

SUMMARY OF ARGUMENT

The Petition should be granted in order to redress a significant and direct conflict between the Ninth Circuit's decision and clear holdings of this Court in *Ellis v. BRAC* and *CWA v.Beck* and with the Fourth Circuit's holding in the *Beck* case. The Ninth Circuit's enforcement of the NLRB's Order compels objecting union nonmembers to pay dues in support of organizing efforts outside their own bargaining units, in direct contravention of established law.

The Ninth Circuit's reading of this Court's prior decisions cannot be supported. In large part, the Ninth Circuit's holding is based upon a rationale which was expressly considered and rejected by this Court in both *Ellis* and *Beck*. The Court must reaffirm these holdings now in order to preserve the rule of law.

The issue presented by this case is an important one, affecting the collection and expenditure of millions of dollars

and many thousands of employees. Absent review and reversal of the Ninth Circuit's holding, this Court's *Beck* decision, already severely challenged during the last decade, will be deprived of all meaning. The Petition should therefore be granted and the court of appeals should be reversed.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW IN ORDER TO RESOLVE A DIRECT CONFLICT AMONG THE CIRCUITS AS TO THE CHARGEABILITY OF UNION ORGANIZING COSTS TO OBJECTING NONMEMBERS.

As the Petitioners have shown, the *en banc* Ninth Circuit decision in this case is the only decision of any state or federal court to require objecting nonmembers of a union to pay for union organizing elsewhere as a condition of employment. Pet. at 21. The Ninth Circuit's ruling thereby conflicts with this Court's plain holdings in *Ellis v. BRAC*, 466 U.S. 435 (1984), and *CWA v. Beck*, 487 U.S. 735 (1988). The Ninth Circuit's decision further conflicts directly with the decision of the Fourth Circuit interpreting the NLRA in *Beck v. CWA*, 776 F. 2d 1187, 1211-12 (1985), *aff'd en banc*, 800 F. 2d 1280, 1282 (4th Cir. 1986), *aff'd*, 487 U.S. 735 (1988). Finally, the reasoning underlying the Ninth Circuit's *en banc* decision conflicts with the rationales set forth in every other federal or state court decision on the chargeability of union organizing costs since *Ellis*. *See Bromley v. Michigan Educ. Ass'n*, 82 F. 3d 686, 696 (6th Cir. 1996); *Lehnert v. Feris Faculty Assn*, 643 F. Supp. 1306, 1324-25 (W.D. Mich. 1986), *affd*, 881 F. 2d 1388 (6th Cir. 1989), *aff'd in part and rev'd in part on other grounds*, 500 U.S. 507 (1991); *see also Cumero v. Public Employment*

Rel'ns Bd., 262 Cal. Rptr. 46, 61-63, 778 P. 2d 174, 189-91 (Cal. 1989) and other cases cited by Petitioners. Pet. at 21-22.

This Court's review is required to resolve the direct conflict resulting from the Ninth Circuit's misreading of and departure from the above established precedent. In *Ellis*, this Court unanimously rejected the Ninth Circuit's identical claim that union organizing expenses should be chargeable to objecting nonmembers under the Railway Labor Act. The Court held that the connection between collective bargaining and the success of union organizing in other bargaining units was "attenuated," and that "such expenditures are outside Congress' authorization." *Ellis*, 466 U.S. at 451.

In *Beck*, this Court applied the principles of *Ellis* to the NLRA, reaffirming that Section 8(a)(3) of the NLRA and Section 2, Eleventh are "statutory equivalents." *Beck*, 487 U.S. at 762. Contrary to the Ninth Circuit, the *Beck* Court declared: "We think it clear that Congress intended the same language to have the same meaning in both statutes." Id. at 747.

The *Beck* Court ultimately affirmed a Fourth Circuit decision which addressed the precise issue decided here by the Ninth Circuit, with the opposite result. The original Fourth Circuit panel, relying on *Ellis*, held that organizing costs were nonchargeable under the NLRA. As the *en banc* decision of the Fourth Circuit in *Beck* unanimously found: "[A]ssuming that federal jurisdiction was upheld [as it was], that the majority panel opinion's disposition of the allocation issue was properly resolved." 800 F. 2d at 1282.

In the face of this compelling precedent, the misreading of this Court's decisions by the Ninth Circuit and the NLRB cannot be justified and must be reversed. The Ninth Circuit and the Board have asserted that questions regarding implementation of the *Beck* decision were left open by this

Court in *Beck* and that a different result from *Ellis* should be permitted because of the supposedly different legislative histories of the NLRA and the RLA. Pet. App. 14a-22a (Ninth Circuit); and 59a-67a (NLRB). According to the court of appeals, the fact that this Court has applied the two statutes differently in different contexts permits the NLRB to presume to chart its own course in the present case. Id.[2]

The Ninth Circuit's analysis ignores the fact that, as to the *present context*, the *Beck* decision clearly and conclusively forecloses the NLRB's attempt to interpret the NLRA differently from the RLA. As NLRB Member Brame stated in his dissenting opinion in this case:

> [T]he Court in *Ellis* found that under Section 2, Eleventh of the Railway Labor Act organizing expenses are not chargeable to objectors, and the Court in *Beck* found that Section 8(a)(3) of the National Labor Relations Act has the same meaning as Section 2, Eleventh of the Railway Labor Act. Taken together, these holdings compel the conclusion that under Section 8(a)(3) of the National Labor Relations Act organizing expenses are not chargeable, as such expenses are not chargeable under Section 2, Eleventh of the Railway Labor Act, whose meaning the Court has found to be the same as that of Section 8(a)(3). ...
>
> It is simply too late in the day to contend that a different interpretation is

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[2] The legerdemain necessary to reach the Ninth Circuit's conclusion is best summed up in the following quotation from the court's opinion, referring to this Court's mandate that the NLRA and the RLA be given the same meaning: "Giving the provisions this same general meaning, ... does not mean that they must be applied identically...." Pet. App. 20a.

> warranted based on Section 8(a)(3)'s legislative history. That argument is foreclosed by *Beck*'s holding that Section 8(a)(3) of the National Labor Relations Act has the same meaning as Section 2, Eleventh of the Railway Labor Act.

Pet. App. 87a-88a (Brame, dissenting).

It is also worth noting that, contrary to the Ninth Circuit, the legislative histories of the two statutes are not significantly different on the present issue, i.e., the relationship between union organizing outside a bargaining unit and a union security clause compelling dues within that unit. In enacting both statutes, Congress envisioned that union organizing would take place.[3] In neither case, however, did Congress see fit to compel any employees in one bargaining unit to support organizing in another. Neither the NLRB nor the Ninth Circuit cites any legislative history stating or even implying such a distinction.

In both *Ellis* and *Beck*, this Court found that Congress's intent under the RLA and the NLRA was identical: to prevent "free riders" from benefiting from union representational activities in their own places of employment. *Ellis*, 466 U.S. at 452; *Beck*, 487 U.S. at 746-54.[4] Just as nonmembers could not be compelled to support outside union political activities which could have been thought to have

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[3] Compare Sec. 2, Fourth of the RLA ("Employees shall have the right to organize and bargain collectively through representatives of their own choosing.") with Sec. 7 of the NLRA ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing.").

[4] "[T]he free rider Congress had in mind was the employee the union was required to represent and from whom it could not withhold benefits obtained for its members. Non-bargaining unit organizing is not directed at that employee." *Ellis*, 466 U.S. at 452.

some "strengthening" effect on the union as a whole, so the Court held that nonmembers could not be compelled to support outside union organizing activities.

By attempting to manufacture a distinction between the RLA and the NLRA in the present case, the NLRB and the court of appeals have ultimately repeated the same discredited historical arguments which the union made to this Court in *Beck*, and which this Court correctly rejected. The present Petition must be granted in order to maintain the consistency of this Court's precedent in the face of such a direct challenge.

II. THE ISSUE OF WHETHER OBJECTING NONMEMBERS OF UNIONS CAN BE FORCED TO PAY DUES TO SUPPORT UNION ORGANIZING CAMPAIGNS IS OF GREAT PUBLIC IMPORTANCE.

The NLRB's Order in this case, as enforced by the Ninth Circuit, threatens to undermine the carefully balanced law permitting and restricting the uses of compulsory union dues, as established by this Court in *Ellis* and *Beck*. Full implementation of the Court's holdings has already been severely challenged due to problems of notification to employees and inconsistent enforcement by the NLRB over the last decade. *See Note, What a Sham(e): The Broken Beck Rights System in the Real World Workplace*, 47 Wayne L. Rev. 1049 (2001).[5] Allowing the NLRB and the Ninth Circuit in the present case to ignore this Court's holdings altogether would cause irrevocable damage to the rule of law and would

[5] "This Note determines that the *Beck* system, as it exists, makes it nearly impossible for average employees to successfully assert the rights granted by the Court. By deciding cases in each of these different areas in a piecemeal fashion, the courts and the Board have hamstrung the process as a whole." *Id.* at 1050.

jeopardize the protections owed to objecting nonmembers of unions.

The Ninth Circuit's decision to affirm the NLRB, if left in place, could affect millions of dollars in compelled contributions. During his first two years in office alone, AFL-CIO President John Sweeney added $30 million to the union's organizing fund, all derived from dues payments, most of which are compelled.[6] Delegates to a recent AFL-CIO convention unanimously passed a resolution calling on unions to devote 30 percent of their budgets to organizing. President Sweeney said "many unions already are on track to meet or exceed the 30 percent commitment." "Union Organizing: AFL-CIO Convention Recommits Labor," *Daily Labor Report* (BNA)(Dec. 11, 2001).

Notwithstanding the findings of the NLRB in this case, the benefits of such expenditures to objecting nonmembers remain utterly attenuated. The record before the Board was devoid of facts or analysis to establish that organizing expenditures charged to the nonmembers actually produced any benefits for these employees. Instead, the Board relied on anecdotal evidence and disputed wage statistics that failed to establish any cause and effect relationship between union organizing outside a particular bargaining unit and the benefits of union representation within that unit.

The NLRB and Ninth Circuit decisions here ignore such factors as levels of unemployment in various markets, the size of organized employers relative to the total labor market serving the organized employers, the elasticity of demand for the end products, availability and cost of labor saving devices, and the elasticities of other productive factors. See Pet. App. 89a-90a (Brame, dissenting). *See also*,

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[6] "AFL-CIO to Continue Focus on Organizing," 154 Lab. Rel. Rep. (BNA) 82 (Jan. 27, 1997).

Lewis, Unionism and Relative Wages in the United States: An Empirical Inquiry (1963) and Union Relative Wage Effects: A Survey (1986)(finding that relative wage gains among union employees are related more to fluctuations in the general economy than to union bargaining).

Thus, nothing has changed which justifies the NLRB's unauthorized attempt to rewrite this Court's decisions in *Ellis* and *Beck*. The Board and the Ninth Circuit must not be permitted to evade and undermine this Court's holdings, to the detriment of objecting nonmembers who want no part of the union's organizing efforts outside their own bargaining units.

Conclusion

For the reasons set forth in the Petition and in the foregoing brief, the Amici ask that the Petition be granted and the Ninth Circuit decision be reviewed and set aside.

Respectfully submitted,

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